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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL PAUL SOTO,

Defendant and Appellant.

B211737

(Los Angeles County
Super. Ct. No. PA056563)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Jose I. Sandoval, Judge. Affirmed.

Lise M. Breakey, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson
and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Michael Paul Soto (appellant) of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ The trial court found that appellant had served seven prior prison terms (§ 667.5, subd. (b)); suffered three prior strike convictions (§§ 1170.12, subds. (a)–d); 667, subds. (b)–(i)); and suffered three prior convictions for serious felonies (§ 667, subd. (a)(1)). After denying appellant’s *Romero* motion,² the trial court sentenced appellant to 25 years to life for the assault with a deadly weapon and an additional term of five years for each of appellant’s three prior convictions for serious felonies under section 667, subdivision (a)(1).³ His total term is 40 years to life.

Appellant appeals on the ground that the trial court abused its discretion by refusing to strike appellant’s remote prior strike convictions under section 1385.

FACTS

Prosecution Evidence

William Dandurand (Dandurand) was working as a security guard at the Newhall Metrolink station on June 18, 2007. Appellant frequently loitered at the station, and Dandurand had often conversed with him. Appellant was at the station that afternoon and was drunk and belligerent. Dandurand asked him to leave. Appellant became threatening and tried to provoke a fight. One of appellant’s friends had to restrain him, and appellant stormed off.

Approximately three or four hours later, as Dandurand was observing the parking lot, he saw appellant running down a staircase approximately 10 feet away. Appellant ran up to Dandurand and tried to stab him in the stomach with a large knife. Dandurand moved slightly and was stabbed in the left side. Appellant said, “I’ll kill you.” Dandurand began walking backwards, and appellant swung his knife at him. When Dandurand blocked the knife with his arm he was sliced in the wrist. Dandurand walked

¹ All further statutory references are to the Penal Code unless stated indicated.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

³ The abstract of judgment incorrectly cites section “667(B)(1)” as the statute under which the five-year enhancements were imposed.

backwards into street traffic, stopping it with his hand, and appellant did not follow him. Dandurand showed the jury his scars and identified the knife, which had a blade of approximately eight inches.

Appellant was not using a wheelchair that day. In the approximately 100 times Dandurand had seen appellant at the station, he had only seen appellant in a wheelchair one time.

Frances Giamona (Giamona), a field service representative for Metrolink, was sitting on a bench with her husband at the Newhall station. She saw appellant stab Dandurand with a butcher knife. Appellant said, "You see, you see." He swung the knife again. Shortly thereafter, Giamona saw a juvenile holding the knife behind his back while appellant shouted, "I don't care, I'll go back." The juvenile put the knife into a recycling bin and went towards appellant and began pulling on him to take him away. Appellant and the juvenile left the station. Giamona's husband went to the recycling bin and guarded the knife until police came. Giamona saw the police recover the knife. Giamona identified appellant in a field showup. Giamona had seen appellant with a cane before, but he did not use one that day. Appellant had no trouble walking that day.

Giamona's husband, Todd Stansbury, identified appellant as the stabber and gave a similar account of the stabbing and recovery of the knife. He also identified appellant in a field showup.

Defense Evidence

Alexander Soto (Alexander), appellant's brother, stated that appellant lived with him at the time of the stabbing. Appellant had difficulty walking and used a brace, a cane, and sometimes a wheelchair. Alexander never saw his brother run or walk at a rapid pace. On the day of the stabbing, Alexander was home all day except for the period of 2:30 p.m. to 3:00 p.m. Appellant left the house around 2:00 p.m. but returned before Alexander left, and appellant did not leave again until arrested. Alexander acknowledged he did not go to the police in the year since appellant's arrest to tell them appellant was home with him at the time of the offense.

DISCUSSION

A. Appellant's Argument

Appellant contends the trial court abused its discretion when it failed to properly weigh appellant's age and disabilities as well as the age of his prior convictions against the interests of society under *Romero* and *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*). The trial court's refusal to strike the prior convictions resulted in "massive overkill" in that appellant is in fact being imprisoned for the rest of his life. Appellant also argues that the trial court violated appellant's rights under the Eighth Amendment to the federal Constitution as interpreted in *Solem v. Helm* (1983) 463 U.S. 277.

B. Relevant Authority

We review the trial court's ruling for abuse of discretion. (*William, supra*, 17 Cal.4th at p. 162; *Romero, supra*, 13 Cal.4th at p. 530.) The burden is on the party attacking the sentence to establish that the sentencing decision was irrational or arbitrary. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) "It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers, supra*, at p. 310.)

A court's power to dismiss a prior conviction is to be limited by the concept that the dismissal should be in the "“furtherance of justice.”" (*Romero, supra*, 13 Cal.4th at p. 530.) According to *Williams*, in order to "render Penal Code section 1385(a)'s concept of 'furtherance of justice' somewhat more determinate," justice should be sought within the "interstices" of the particular sentencing scheme, because the scheme itself suggests its spirit. (*Williams, supra*, 17 Cal.4th at p. 160.) This search must be "informed by generally applicable sentencing principles" relating to matters such as the nature of the current felonies, the defendant's prior convictions, and his "background, character, and

prospects,” which are intrinsic to the scheme. (*Id.* at pp. 160, 161.) The court cautioned that the standard for review of an exercise of discretion is “deferential,” although not “empty,” requiring the reviewing court to determine whether a ruling exceeds the bounds of reason under the law and relevant facts. (*Id.* at p. 162.)

C. No Abuse of Discretion

At the outset we note that, although appellant makes a perfunctory reference to an Eighth Amendment violation, he presents no argument or authority regarding this claim. We therefore do not discuss this issue. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214, fn. 11; *People v. Turner* (1994) 8 Cal.4th 137, 214, fn. 19, disapproved on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.)

In arguing the *Romero* motion, defense counsel gave four reasons why the motion should be granted. He stated that the strike priors were old, and there was nothing “aggravating” in the strike offenses, since appellant received probation for one offense and a relatively low sentence of two years for the other. Thirdly, appellant is in poor health. Finally, by striking two of the strike convictions the trial court could still impose a second-strike sentence with substantial time.

On appeal, appellant elaborates upon the same grounds. He states that the nature and circumstances of his strike convictions show that he falls outside the three strikes sentencing scheme at least in part. Appellant’s 1980 conviction for robbery occurred 28 years before sentencing in the instant case. Appellant’s second conviction, for attempted burglary, occurred in 1983—25 years before the current sentencing hearing. Appellant’s criminal record subsequent to these convictions shows a drastic decline in the number and severity of his offenses. Appellant committed only two minor, nonviolent offenses—being under the influence of a controlled substance and failing to register as a sex offender—between his third strike conviction in 1992 and the instant case, which was a period of 15 years.

Appellant adds that the trial court failed to give sufficient weight to the strong mitigating factors he put forth. Appellant was 58 years old at sentencing and has

impaired mobility. He reportedly has asthma, chronic obstructive pulmonary disease, and hepatitis C. Appellant said he has had three heart attacks and approximately eight strokes, which have damaged his vision. He is also mentally disadvantaged and poorly educated. Appellant said he was unable to follow court proceedings unless people spoke slowly.

Appellant points out that, if he had been sentenced as a one-strike offender, he would have received a sentence of 23 years. He would have been required to serve at least 18 years and five months of such a sentence under section 667, subdivision (c)(5). This would have amply served the public interest. Upon release, appellant would be in his mid-70's and, given his poor health, physically incapable of committing violent or serious crimes.

It is clear that the trial court considered all of these circumstances. The trial court said it had read both the People's and the defense sentencing memoranda as well as the probation report. The trial court considered the *Romero* motion and allowed defense counsel to add to the written motion.

In making its ruling, the trial court amply demonstrated that it had followed the precepts of *Romero* and *Williams* in denying appellant's *Romero* motion. After hearing argument, the trial court stated, "This is a case that I listened to very carefully, a case where I carefully read the defendant's—counsel's motion for striking the strikes pursuant to the *Romero* law. . . . [H]aving looked carefully at what the Court of Appeal permits this court to exercise its discretion within, and looking carefully at this particular crime and noting that he had just gotten out of prison after 10 years, and 10 months later reoffended in a serious violent case . . . I am going to deny to exercise my discretion and grant the—I will deny the *Romero* motion. I will not exercise my discretion. I do not do that lightly. I understand that he, the defendant, has some health problems, and I understand the seriousness of the sentence I'm about to impose. Notwithstanding that, I feel compelled within the facts of this case and within the discretion allotted to me by the Court of Appeal that I'm within my discretion not to grant the *Romero* motion." After

sentencing, the trial court stated, “Let me just say that I do not make this decision lightly. I grappled with it for some time. Should the Court of Appeal decide that I’ve abused my discretion in not exercising it, I’ll welcome whatever correction they may offer. With that, sir, good luck.”

The record thus shows that the trial court considered the “particulars of [appellant’s] background, character, and prospects.” (*Williams, supra*, 17 Cal.4th at p. 161.) The trial court made specific mention of appellant’s health problems but also noted that the circumstances of the current crime were very serious. With respect to appellant’s background, according to the probation report, appellant’s adult criminal history began in 1967, when he spent over a year in the California Youth Authority (CYA) after having committed assault with a deadly weapon. He was paroled in January 1969 and sent back to CYA a little over two months later for the offense of assault with intent to commit rape. He was paroled in April 1970, and in September 1970, he was convicted of burglary and suffered a parole violation. He was paroled in May 1972 and approximately four months later was convicted of battery upon a peace officer, for which he received summary probation. In 1974 and 1977 he suffered several convictions for Vehicle Code violations and a conviction for battery.

For his first strike, in 1980, appellant was given 36 months formal probation, but probation was revoked and he was sent to prison. In 1981, appellant was convicted of being a felon in possession of a firearm and sentenced to three years in prison. He was paroled in January 1983 and committed the offense of attempted first degree burglary in May 1983, for which he was sentenced to two years and paroled in July 1984. Between being paroled in July 1984 and a conviction for assault with a deadly weapon in February 1992—a span of approximately eight years—appellant was convicted of possession of burglary tools, trespass (on two occasions) forgery, possession of a controlled substance, being under the influence of a controlled substance (on two occasions), and battery. Along the way, appellant’s criminal record reveals many parole violations and recommitments. Appellant received two years in state prison for his

February 1992 offense, was apparently paroled, and suffered a parole violation in September 1994. In September 1996 he was terminated from parole. In July 1998 appellant was arrested for being under the influence of a controlled substance and failing to register as a felony sex offender. He was convicted in June 1999 of both offenses and sentenced to 10 years in prison. His parole date is not stated in the probation report, but on November 17, 2006, he suffered a violation of parole. Seven months later he committed the instant offense.

Appellant's current crime was one of premeditated and brutal violence. Only the victim's quick movement saved him from more serious injury. As emphasized in *People v. Garcia* (1999) 20 Cal.4th 490, when deciding whether to strike prior convictions under section 1385, the trial court must consider not only the constitutional rights of the defendant, but also the “““interests of society represented by the People. . . .”””” (*People v. Garcia, supra*, at pp. 497–498, citing *Romero, supra*, 13 Cal.4th at p. 530.) In making a discretionary decision, a court abuses its discretion when its decision “falls outside the bounds of reason’ under the applicable law and the relevant facts” (*Williams, supra*, 17 Cal.4th at p. 162.) The trial court's words indicate it seriously considered the exercise of its discretion. The court fully complied with section 1385 and the California Supreme Court's holding in *Romero* and acted as a “reasonable judge.” (*Williams, supra*, at p. 159, quoting *Romero, supra*, 13 Cal.4th at p. 531.)

DISPOSITION

The judgment is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ